

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	Docket No. 95 C 4194
v.	)	
	)	
INTERSTATE BAKERIES CORPORATION,	)	Judge Manning
and CONTINENTAL BAKING COMPANY,	)	
	)	
Defendants.	)	

**MEMORANDUM IN SUPPORT OF  
UNITED STATES' MOTION FOR AN ORDER TO SHOW CAUSE  
WHY DEFENDANT INTERSTATE BAKERIES CORPORATION  
SHOULD NOT BE HELD IN CIVIL CONTEMPT OF COURT**

**I. INTRODUCTION**

The United States filed a civil antitrust complaint on July 20, 1995 to block the merger of Interstate Bakeries Corporation ("IBC") and Continental Baking Company, two of the three largest producers of white pan bread. The acquisition would have given IBC control of all the major, premium label white pan bread in Southern California. At the same time the suit was filed, a settlement agreed to by the parties was filed in the form of a proposed final judgment. This Court entered the Final Judgment on January 9, 1996. The Final Judgment required IBC to divest one of its labels, including formulas and production knowhow, in order to establish a viable competitor. IBC now refuses to transfer the production knowhow in direct violation of the Court's Order.

Pursuant to the Final Judgment, in September 1997 IBC licensed the Weber's label to Good Stuff Food Company (now known as Four-S Baking Company, hereinafter "Four-S") for production and sale of Weber's bread in the Southern California area. The Final Judgment

required IBC to grant “a perpetual, royalty-free, assignable, transferable, exclusive license” to use the Weber’s label. Final Judgment ¶ IV.A (Attachment 1). Approximately eight months ago, Four-S decided to sell its business, including its rights to the Weber’s label, and on March 29, 1999, Bimbo Bakeries USA, Inc. (“Bimbo”) became the sole stockholder of Four-S.<sup>1</sup>

IBC is now attempting to revoke unilaterally a part of the divestiture ordered by this Court. With the change in ownership of Four-S, IBC demanded, in a letter dated March 26, 1999, that Four-S return the formulas and production processes for the baking of Weber’s bread, the very knowhow that the Court had ordered IBC to divest. Moreover, IBC has threatened to sue Four-S and its new owner, Bimbo, if they continue to use the assets that were ordered divested by the Court. Because of IBC’s action and threats, Four-S has stopped using the formulas and production processes for the baking of Weber’s bread. In order to preserve the Court’s order, and to preserve competition in white pan bread, the United States moves for an order requiring IBC to show cause why it should not be held in civil contempt.

## **II. STATEMENT OF FACTS**

### **A. The Final Judgment**

On January 9, 1996, the Court issued a Final Judgment, consented to by IBC, resolving a Complaint filed by the United States challenging the acquisition of Continental Baking Company by IBC as violating the Clayton Act. As stated on page 1 of the Final Judgment, the intent of the parties was “to require defendants to make certain divestitures for the purpose of establishing viable competitors in the sale of white pan bread.” Paragraph IV.A of the Court’s Final

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<sup>1</sup>The Court may recall that IBC sought permission to reacquire the Weber’s brand. Four-S chose, however, to merge with Bimbo, which mooted IBC’s pending motions.

Judgment requires that the license granted by IBC to Four-S to use the Weber's label be "a **perpetual**, royalty-free, **assignable**, **transferable**, exclusive license." (Emphasis added.) Under

¶ II.D of the Final Judgment, the license to use the label includes:

all legal rights associated with a brand's trademarks, trade names, copyrights, designs, and trade dress; the brand's trade secrets; **the brand's production knowhow, including, but not limited to, recipes and formulas used to produce bread sold under the brand;** and packaging, marketing and distribution knowhow and documentation, such as customer lists and route maps, associated with the brand.

(Emphasis added.)<sup>2</sup>

#### B. The Knowhow Agreement

Pursuant to the Court's Final Judgment, IBC granted a license to Four-S to sell Weber's bread in Southern California. To effectuate the trademark license, IBC and Four-S entered into a Technical Information And Confidentiality Agreement on September 30, 1997 (hereinafter "Knowhow Agreement"). Rimer Declaration ¶ 2 (Attachment 2); Muldoon Declaration ¶ 3 (Attachment 3). The Knowhow Agreement covers the "formulas and production processes" to manufacture Weber's bread. Knowhow Agreement ¶ 1 (Attachment A to Rimer and Muldoon Declarations). It requires IBC to supply Four-S with the formulas and production processes "reasonably necessary to manufacture [Weber's] products," (Knowhow Agreement ¶ 1) and prohibits Four-S from disclosing the formulas and production processes without IBC's consent, unless the information is "required to be disclosed by a court or government authority," in which event Four-S must give IBC "prompt notice of such requirement and such opportunity as may be reasonably available under the circumstances for IBC to contest such requirement." Knowhow

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<sup>2</sup>Under ¶ III.B of the Final Judgment, Four-S agreed to be bound by the Court's Final Judgment.

Agreement ¶ 2(4).

Paragraph 6 of the Knowhow Agreement states: “This Agreement shall not be assigned by GSFC [Good Stuff Food Corporation] without the express written consent of IBC. Any change of control of GSFC by operation of law or otherwise shall be deemed to be an assignment for purposes of this paragraph 6.” As is customary in settlements of merger complaints, the Antitrust Division reviewed the proposed asset sale agreement between IBC and Four-S, including the Knowhow Agreement, and informed IBC that it found the divestiture acceptable. Review by the Antitrust Division is intended to ensure that the divestiture establishes a viable competitor. To the extent that any agreement between the parties is inconsistent with the Final Judgment, the Final Judgment, as an order of this Court, must prevail. In light of this contract provision, on March 17, 1999, Four-S formally notified IBC that it would be acquired by Bimbo and requested IBC’s consent to the assignment of the formulas and production processes. Rimer Declaration ¶ 4; Muldoon Declaration ¶ 3.<sup>3</sup>

On March 26, IBC informed Four-S that IBC “does not consent to the assignment of the rights and obligations of Licensee, nor any disclosure of any [formulas and production processes] to Bimbo . . . .” Rimer Declaration ¶ 5; Muldoon Declaration ¶ 4. IBC’s letter also stated that if Bimbo acquired Four-S, then the Knowhow Agreement would be terminated, and IBC demanded the return of the formulas and production processes for Weber’s bread. Finally, IBC threatened to bring suit against Four-S and Bimbo.

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<sup>3</sup>On March 25, 1999 an attorney for the Department of Justice informed IBC that “we do not believe that IBC’s consent to the transfer of knowhow is necessary,” and if IBC disagreed and refused to consent so as to disrupt the transfer of Weber’s to Bimbo, we would seek appropriate Court action. Attachment 4.

### C. The Four-S and Bimbo Merger

On March 29, 1999, Bimbo became the sole stockholder of Four-S. Rimer Declaration ¶¶ 3 & 6; Muldoon Declaration ¶¶ 2 & 5. Based on IBC's March 26<sup>th</sup> letter, Four-S did not disclose the formulas and production processes to manufacture Weber's bread to anyone at Bimbo, the information was put in a bank safe, and since March 29<sup>th</sup>, Four-S has been baking Weber's bread without using the formulas and production processes. Rimer Declaration ¶ 7; Muldoon Declaration ¶ 6. This has added significant costs, difficulties, and risks for Four-S and its owner Bimbo as they try to compete with IBC in the sale of white pan bread in Southern California. Rimer Declaration ¶ 7; Muldoon Declaration ¶ 7.

First, employees of Four-S who know the formulas and production processes have been placed on paid administrative leave and replaced by workers from Bimbo's out-of-state plants who are using Bimbo's own formulas and knowhow to try to produce Weber's bread in the Southern California plant. Muldoon Declaration ¶ 8. Second, Bimbo and Four-S face the significant risk that IBC will claim that the Weber's bread being baked with Bimbo's formulas and knowhow does not meet the standards and specifications under the trademark licence agreement. Defending such challenges would raise Bimbo's costs and damage its reputation in the market. Moreover, IBC's ability to challenge the quality of Weber's bread -- despite the fact that IBC has taken actions to prevent Four-S and Bimbo from using, or even knowing, Weber's formulas and production processes -- creates continuing uncertainty and risk for the brand. Muldoon Declaration ¶¶ 9 & 10.

### III. ARGUMENT

#### A. Jurisdiction

This Court has inherent power to enforce compliance with its orders. 18 U.S.C. § 401(3) (1988) (“A court of the United States shall have power to punish . . . at its discretion, such contempt of its authority . . . as disobedience or resistance to its lawful writ, process, order, rule, decree, or command.”); *see also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193-194 (1949). A court whose order has been disobeyed has jurisdiction and venue to hear the contempt proceeding. *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454-455 (1932).

Moreover, Section XI of the Final Judgment provides:

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

#### B. Legal Standard

Failure to comply with a court order or decree may be deemed contempt. In order for the defendant to be found in civil contempt, the United States must show by clear and convincing evidence that there was a lawful decree, that the defendant had knowledge of the decree, and that the decree was violated. *United States v. Greyhound Corp.*, 363 F. Supp. 525, 570 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974). Evidence of intent or willfulness on the part of the defendant is not required for a finding of civil contempt. *Greyhound Corp.*, 363 F. Supp. at 570; *McComb*, 336 U.S. at 191. In this case, there can be no dispute that the Final Judgment was lawful and that IBC had knowledge of it. The only issue is whether IBC violated the Final

Judgment.

C. IBC is in Contempt of This Court's Final Judgment

In 1996, this Court ordered IBC to divest the Weber's label and its formulas and production knowhow. In 1997, IBC made the divestiture to Four-S. Based on a change in ownership of Four-S as of March 29, 1999, IBC has threatened to sue Four-S and its new owner, Bimbo, if they continue to use the formulas and production processes for the baking of Weber's bread. In fact, IBC has demanded the return of the very formulas and production processes that the Court had ordered IBC to divest. Because of IBC's action, Four-S has stopped using the formulas and production processes for the baking of Weber's bread, and has incurred, and continues to incur, substantial costs, difficulties and risks as it tries to produce and sell Weber's bread in competition with IBC. IBC's demand that Four-S return the Weber's formulas and production process that IBC was ordered to license is an attempt to revoke unilaterally a part of the divestiture ordered by this Court and places IBC in violation of the Final Judgment -- and therefore in civil contempt of the Court's Order. *See, e.g., Commodity Futures Trading Commission v. Premex, Inc.*, 655 F.2d 779 (7<sup>th</sup> Cir. 1981) (violation of consent decree was clear and convincing, based upon documentary evidence submitted by CFTC, and defendant was properly held in civil contempt, regardless of motives or intent).

Apparently, IBC's position is that regardless of the Court's Final Judgment, the Knowhow Agreement between IBC and Four-S allows IBC to block Four-S from disclosing or using the formulas and production processes for Weber's bread once Bimbo became the sole stockholder of Four-S. But IBC cannot limit its obligations under the Final Judgment through a private agreement with Four-S. *See Magnesco Restaurants, Inc. v. Arthur Treacher's Fish & Chips*,

*Inc.*, 689 F.2d 1150, 1156-1157 (3d. Cir. 1982) (where order prohibited any action by defendant which would interfere with plaintiff's supply of products, defendant was in contempt of order by canceling supply agreement with plaintiff's supplier, even though order did not specifically require defendant to maintain supply agreement; violation was of both the letter and spirit of the court's order).<sup>4</sup> Even assuming, *arguendo*, that there has been an assignment of the formulas and production processes from Four-S to Bimbo, the Court's Final Judgment expressly requires the transferability and assignability of the Weber's label, which, according to the definition in the Final Judgment, includes all formulas and production knowhow regarding the label. Final Judgment ¶¶ IV.A & II.D. Thus, IBC's apparent interpretation of the Knowhow Agreement is inconsistent with the Final Judgment's wording and purpose.

#### D. Relief

Civil contempt "is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). A court may order a fine to coerce a defendant into compliance with the court's order. *Shakman v. Democratic Organization of Cook County*, 533 F.2d 344,349 (7<sup>th</sup> Cir. 1976). In addition, to compensate the petitioner for its efforts in seeking the defendant's compliance with the order, "an award of costs and attorney fees in civil contempt is clearly proper." *Id.* at 351.

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<sup>4</sup>In fact, the Knowhow Agreement itself recognizes the primacy of the Court's Final Judgment. The Knowhow Agreement prohibits disclosure of the formulas and production processes, but carves out an exception for "any information required to be disclosed by a court or government authority, provided GFSC gives IBC prompt notice of such requirement and such opportunity as may be reasonably available under the circumstances for IBC to contest such requirement." Knowhow Agreement ¶ 2(4). Thus, IBC recognized that any limits imposed by the Knowhow Agreement are circumscribed by the Court's Final Judgment.



Since IBC has violated the Court's order once, the United States requests that the Court (1) find IBC in contempt; (2) order IBC to, within 5 days, comply with the Final Judgment by providing to Four-S the information required in paragraph IV.A of the Final Judgment; (3) fine IBC for each day it is in violation of the Court's Order to comply with the Final Judgment, in an amount not to exceed \$10,000 a day; (4) award the United States its costs and attorneys fees incurred in making this motion; and (5) grant any an all other relief as the Court may deem justified by IBC's actions. Finally, the United States respectfully requests that the Court issue a show cause order expeditiously because Four-S is continuing to incur the costs imposed by IBC's contempt and to be hindered in its ability to compete with IBC in the sale of white pan bread in Southern California. Muldoon Declaration ¶ 4.

#### **IV. CONCLUSION**

IBC has effectively prevented Four-S, its competitor in the sale of white pan bread in Southern California, from using the formulas and production processes used in the baking of Weber's bread that the Final Judgment required IBC to divest to Four-S. Therefore, the United States moves the Court to issue an order requiring IBC to show cause why it should not be held in civil contempt.

Dated: April 12, 1999

Respectfully submitted,

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